Supreme Court, U.S.
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No. 2008-

In The

SUPREME COURT OF THE UNITED STATES

October Term 2007

BRUCE HOLTE HAGEN,
Petitioner,

-v-

JAMES MCDONALD and MIKE McGRATH,
Respondents.

Petition For a Writ of Certiorari
To The Ninth Circuit Court of Appeals

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Petitioner Hagen

QUESTION PRESENTED

1. Where Hagen was tried on two counts – aggravated assault and deliberate homicide – which arose out of the same course of conduct and the state post-conviction court found that trial counsel's performance was constitutionally deficient and that Hagen was prejudiced thereby, was it unreasonable to conclude that the error went only to the aggravated assault charge and not the deliberate homicide charge and that the prejudice could be cured by running the sentences concurrently?

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BRUCE HOLTE HAGEN,

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PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Petitioner, Bruce Hagen, respectfully prays that a writ of certiorari issue to review the Memorandum of the Ninth Circuit Court of Appeals entered in this proceeding on July 12, 2007, and from which rehearing was denied on January 18, 2008.

OPINIONS BELOW

The Memorandum of the Ninth Circuit Court of Appeals was not published. It is reproduced as

Appendix A. The Order denying the Petition for Rehearing was not published. It is reproduced as Appendix B. The decision of the Montana Supreme Court in the post-conviction case is published at State v Hagen 53 P.3d 885 (Mont. 2002). It is reproduced as Appendix D.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was entered on July 12, 2007. A timely Petition for Rehearing With Suggestion for Rehearing En Banc filed on August 24, 2007, was denied on January 18, 2008. This Petition for Certiorari is filed within ninety days of the denial of the Petition for Rehearing with Suggestion for Rehearing En Banc. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution:

No person shall . . . be deprived of life, liberty, or property, without due process of law. . .

The Sixth Amendment to the United States Constitution:

In all criminal prosecutions the accused shall enjoy the right to. . . have the Assistance of Counsel for his defense.

28 U.S.C. § 2243

* * * * *

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

28 U.S.C. § 2254(d):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

Montana Code Annotated § 46-21-201(6):

If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and any supplementary orders as to reassignment, retrial, custody, bail, or discharge that may be necessary and proper. If the court finds for the prosecution, the petition must be dismissed.

STATEMENT OF THE CASE

I. Procedural Summary.

On October 22, 1993, Bruce Hagen was charged with one count of deliberate homicide and one count of aggravated assault. He pled not guilty to the charges and asserted the defenses of justifiable use of force and defense of an occupied structure. On May 12, 1994, following a jury trial, Hagen was convicted of both offenses. On June 14, 1994, he was sentenced to life imprisonment for deliberate homicide, with an additional ten years for his use of a weapon in the commission of the offense. He was sentenced to twenty years for aggravated assault plus ten years for the use of a dangerous weapon. The district court ordered the sentences to run consecutively.

On July 26, 1994, Hagen's trial lawyer, Matt Pavelich, filed a motion for a new trial informing the court that he negligently failed to call an important witness, Marvin Geyman. The district court denied Hagen's motion for a new trial. On August 4, 1994, Hagen filed a notice of appeal through Stephen Nardi, Esq., who was substituted as counsel for purposes of appeal. On appeal Nardi raised several claims of ineffective assistance of counsel. Specifically, Nardi argued that Hagen was denied his right to effective assistance of counsel through Pavelich's failures in the following regards: (1) his failure to call Marvin Geyman, a critical witness, who would have testified to prior inconsistent statements made by Reece Cobeen; (2) his failure to

object to the prosecutor's elicitation of prejudicial information during voir dire; (3) his failure to request a specific instruction on Hagen's right to rely on appearances in connection with the defense of justifiable use of force; and (4) his failure to request a negligent homicide instruction. On October 17, 1995, the Montana Supreme Court issued its opinion and order affirming Hagen's conviction. State v. Hagen, 903 P.2d 1381 (1995).

Hagen filed a Petition for Post-Conviction Relief on April 14, 1997, which raised additional allegations of ineffective assistance of counsel. The state district court dismissed the petition on June 13, 1997. Hagen appealed the dismissal of his post-conviction petition to the Montana Supreme Court which issued its order affirming in part, reversing in part and remanding the case for further proceedings on January 22, 1999. Hagen v. State, 973 P.2d 233 (Mont. 1999).

An evidentiary hearing was held before the Twentieth Judicial District Court, Sanders County before the Honorable C.B. McNeil on March 13, 2000. Post-hearing pleadings were filed and, on June 29, 2000, that Court issued its Findings of Fact, Conclusions of Law and Amended Sentence which are reproduced in Appendix C. The state post-conviction court found that trial counsel's performance was deficient and that Hagen was prejudiced as a result of these deficiencies. See, Appendix C, Conclusions of Law 8, 9 and 12:

8. That Defendant's trial counsel could have done a better job of investigating and presenting testimony regarding an alleged reputation for violence and a prior criminal record on the part of Jim Enger, the victim of the aggravated assault charge.

9. That the Defendant may have suffered some prejudice as a result of Conclusion No. 8 with respect to the defendant's claim of self defense of the aggravated assault charge involving Enger.

12. That Defendant's trial counsel could have done a more thorough job of interviewing and preparing witnesses, and Defendant may have suffered some prejudice as a result thereof.

Inexplicably, the state post-conviction court found that the prejudice affected only the aggravated assault charge and not the deliberate homicide charge. In this regard, Conclusion of Law 24 states:

24. That this Court's conclusion that Defendant may have suffered some prejudice as a result of his counsel's deficiencies relate solely to the aggravated assault of James Enger and not to the deliberate homicide of Alice Goodrich.

In Conclusion of Law 25 the state post-conviction court held that the prejudice could be cured by running Hagen's sentences concurrently:

> 25. That any and all such prejudice can be eliminated by the entry by this Court, pursuant to the authority of §46-21-201(6), MCA, of an amended sentence which would provide that the sentence imposed in Twentieth Judicial District, Sanders County Cause No. DC-93-23, filed June 20, 1994 be amended to provide that the sentence for aggravated assault run concurrent with the sentence imposed for deliberate homicide. By such amendment, the sentence imposed for the aggravated assault conviction will be discharged prior to the completion of Defendant's deliberate homicide sentence.

Hagen appealed the state post-conviction court's judgment. It was affirmed by the Montana Supreme Court in State v. Hagen, 53 P.3d 885 (Mont. 2002), which is reproduced in Appendix D.

Subsequently, Hagen filed a Petition for a Writ of Habeas Corpus pursuant to the provisions of 28 U.S.C. § 2254 in the United States District Court for the District of Montana. Both parties consented to magistrate jurisdiction. That court granted relief insofar as it determined that:

> If the trial court determined that the prejudice was sufficient to adjust the sentence then it presumably found that the prejudice undermined confidence in the jury's verdict on the aggravated assault conviction. What is at issue is more than how much time Mr. Hagen must serve in prison. It also involves the propriety of the actual convictions against him. If trial counsel's errors undermine confidence in the jury's verdict on the aggravated assault conviction, then the remedy must be to overturn that conviction. That state court's determination to uphold the district court's remedy of adjusting the sentence was unreasonable.

Findings and Recommendations of the United States Magistrate Judge, Appendix E, p. 69a-70a. Nonetheless, it also held that "it was not an unreasonable determination of the facts in light of the evidence to find that there was not enough prejudice to undermine conf dence in the deliberate homicide conviction." Findings and Recommendations of the United States Magistrate Judge, Appendix E.

Both sides appealed to the Ninth Circuit Court of Appeals. A panel of that Court found that the Federal District Court erred and reinstated the result reached by the Montana state courts by upholding the partial denial of relief and reversing the partial grant of relief. Appendix A. Hagen

filed a Petition for Rehearing With Suggestion for Rehearing En Banc which was denied. Appendix B.

II. Statement of the Facts.

The charges against Hagen arose out of allegations that he seriously wounded James Enger and caused the death of Alice Goodrich by shooting them with a .12 gauge shotgun. In brief, the facts leading to the shootings are that on October 2, 1993, Hagen and his wife, Gabby, spent the afternoon drinking. Later, Gabby and their houseguest, Steve Jennette, went into town to buy tobacco. Tr. III, pp. 53-55. Hagen did not want Gabby to leave, but eventually he gave in and gave Jennette the keys to his truck. Tr. III, pp. 53-55.

In town Gabby and Jennette continued drinking. Tr. III, p. 56. When they decided to return home, they could not get the truck to start. Tr. III, p. 58. They enlisted the assistance of James Enger and Alice Goodrich. Tr. III, p 59-60. Enger called a friend, Reece Cobeen, who agreed to give all four a ride back to the Hagen residence. Tr. III, p. 160.

When the group arrived at the Hagen residence Gabby and Enger began pounding and kicking at the front door. Tr. III, p. 67. Awakened by the noise Hagen, who suffers from macular degeneration, got up. On the way to the door he picked up his shotgun. Tr. IV, p. 30. When he got to the front door, he yelled out "Who's there?" He thought he heard someone respond, "Open up!" Tr.

IV, pp. 54-55. He did not recognize the voice. Tr. IV pp. 34-35.

According to Hagen, when he removed the two-by-four that secured the door, it swung open and he was suddenly attacked. Tr. IV, p. 34. The attack and the ensuing struggle took him by surprise. Tr. IV, p. 69. He did not recognize the person with whom he was struggling and he had no awareness of anything other than the fact he was under attack from someone coming at him. Tr. IV pp. 34-35, 52. He testified that he was determined to hold on to the gun. Tr. IV, pp. 56-57.

Hagen testified that the man he was struggling with had both hands on the gun and, as he was trying to push the man away, he struck him on the head. Tr. IV, pp. 35, 59-60. (Enger's right middle fingerprint was found just above the trigger of the weapon.) Tr. II, pp. 162-165. The struggle continued. Hagen believed that the man was renewing his attack. Tr. IV, p. 35. Hagen shot his gun. Tr. IV, pp. 35, 84. He then heard footsteps to his left and believed that someone was coming towards him. Tr. IV, pp. 39, 60-62. He did not know who the person was or whether the person was armed. Tr. IV, p. 63. He shot in the direction of the second person. Tr. IV, p. 36.

After the shootings, Hagen discovered that the persons he had shot were James Enger and Alice Goodrich. Tr. IV, p. 46. Enger was seriously wounded and Goodrich was killed.

Hagen immediately called 911 to request that

an ambulance and the police be dispatched to his residence. Tr. IV, p. 40. The transcript of the 911 call reveals his state of mind: "I was attacked in my house and I - I - I don't (?) like that. We need an ambulance and we need the police." Evid. Hring., Ex. P.

REASONS FOR GRANTING THE WRIT

I. This Case Presents this Court with a Unique Opportunity to Address the Parameters of the Relief That May Be Fashioned in the Case of a Sixth Amendment Violation.

A. The Decisions of the Courts Below.

The state post-conviction court found that trial counsel's performance was deficient and that Hagen was prejudiced as a result of these deficiencies. Appendix C, Conclusions of Law 8, 9 and 12:

> 8. That Defendant's trial counsel could have done a better job of investigating and presenting testimony regarding an alleged reputation for violence and a prior criminal record on the part of Jim Enger, the victim of the aggravated assault charge.
>
> 9. That the Defendant may have suffered some prejudice as a result of Conclusion No. 8 with respect to the defendant's claim of self

defense of the aggravated assault charge involving Enger.

12. That Defendant's trial counsel could have done a more thorough job of interviewing and preparing witnesses, and Defendant may have suffered some prejudice as a result thereof.

Significantly, these findings go to the credibility of the two key witnesses against Hagen: Jim Enger and Reece Cobeen.

The credibility, or lack thereof, of Enger and Cobeen went directly to the affirmative defense of justifiable use of force. Presentation of evidence regarding Enger's reputation for violence was critical to Hagen's defense both because it undermined Enger's credibility and corroborated Hagen's theory of the case.

Reece Cobeen's credibility was also critical because he was the only sober person on the Hagen property at the time of the shootings. At trial he testified that he heard Hagen shout, "Now Jim, don't fuck with me or I will kill you." This testimony undermined Hagen's affirmative defense by indicating that Hagen identified his assailant before shooting and wounding Enger. However, as established at the evidentiary hearing, Cobeen's initial written statement was that he "heard a struggle and heard Bruce say to Jim 'don't mess with me or I'll kill you.'" (Emphasis supplied)

Tr. Evid. Hrng. p. 4-5. Further, Cobeen talked to Kendra Hagen pretrial and told her that he stood near his truck at the time of the shootings. Tr. Evid. Hrng p. 9-10. Similarly, he told Marvin Geyman that he was standing by his truck at some distance from the Hagen residence at the time of the shootings.

In the direct appeal, the state conceded and the Montana Supreme Court assumed without deciding that trial counsel performed deficiently when trial counsel failed to call Geyman to testify to impeach Cobeen.[1] It denied relief on the grounds that Hagen could not show prejudice from this failure. State v. Hagen, 903 P.2d 1381, 1389 (Mont. 1995). After the evidentiary hearing, however, the state post-conviction court made the above findings of deficient performance, determined that Hagen had suffered "some prejudice" as a result of these

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[1] It stated:

"Defense counsel admits that he negligently failed to get the witness on the stand. The State concedes that the failure of defense counsel to call this witness rendered counsel's performance deficient, thus satisfying the first prong of the Strickland test. However, the State maintains that Bruce has failed to establish that his counsel's performance was so prejudicial that he was denied a fair trial.

For the purpose of this appeal, we will assume without deciding that defense counsel's failure to call a relevant witness resulted in deficient representation. . . .

State v. Hagen, 903 P.2d 1381, 1389 (Mont. 1995).

deficiencies and fashioned a remedy. However, it also found that "counsel's deficiencies relate solely to the aggravated assault of James Enger and not to the deliberate homicide of Alice Goodrich." Appendix C, Conclusion of Law 24.

Flowing from this conclusion, the remedy fashioned by the post-conviction court was to run Hagen's sentences concurrently rather than reversing his convictions. It stated:

> 25. That any and all such prejudice can be eliminated by the entry by this Court, pursuant to the authority of §46-21-201(6), MCA, of an amended sentence which would provide that the sentence imposed in Twentieth Judicial District, Sanders County Cause No. DC-93-23, filed June 20, 1994 be amended to provide that the sentence for aggravated assault run concurrent with the sentence imposed for deliberate homicide. By such amendment, the sentence imposed for the aggravated assault conviction will be discharged prior to the completion of Defendant's deliberate homicide sentence.

Appendix C, Conclusion of Law 25. Both the state post-conviction court's conclusion and "remedy" was upheld by the Montana Supreme Court. Appendix D, p. 23a.

On habeas review, the United States Magistrate Judge recognized not only the fact of deficient performance and prejudice but, also, the significance of Cobeen's testimony and the fact

that the failure to impeach him likely impacted the verdict:

> The Court does not agree with the state court's conclusion that even without Mr. Cobeen's testimony, there was substantial evidence to support the jury's verdict on the aggravated assault charge. Reece Cobeen was the only sober witness to this incident, therefore, it is highly probable that the jury gave his testimony substantially more weight than the other witnesses who were all intoxicated.
>
> Without the testimony of Mr. Cobeen, the only testimony which contradicts Mr. Hagen's self-defense theory was the testimony of Mr. Enger that Mr. Hagen's said to him, "Jim, get out or I'm going to kill you." (Trial Transcript, Vol. III, p. 132). The trial court already determined that there was some prejudice regarding counsel's failure to impeach the credibility of Mr. Enger. Given the lack of impeachment of Mr. Enger the supreme court's finding that there was substantial evidence to support the conviction without Mr. Cobeen's testimony is unreasonable. Mr. Cobeen was the key prosecution witness. His location at the time of the shooting was very relevant to the outcome of this case as was his credibility. Given Kendra Hagen's testimony, a jury would have been free to conclude that if Mr. Cobeen was not being completely honest about his location at the time of the shooting, he may not have been honest in other aspects of his testimony.

Findings and Recommendations of the United States Magistrate Judge, Appendix E, p. 79a, 80.

Relief was granted, but only as to the aggravated assault charge:

> If the trial court determined that the prejudice was sufficient to adjust the sentence then it presumably found that the prejudice undermined confidence in the jury's verdict on the aggravated assault conviction. What is at issue is more than how much time Mr. Hagen must serve in prison. It also involves the propriety of the actual convictions against him. If trial counsel's errors undermine confidence in the jury's verdict on the aggravated assault conviction, then the remedy must be to overturn that conviction. That state court's determination to uphold the district court's remedy of adjusting the sentence was unreasonable.

Findings and Recommendations of the United States Magistrate Judge, Appendix E, p. 69a, 70a.

The United States District Court nonetheless held that "it was not an unreasonable determination of the facts in light of the evidence to find that there was not enough prejudice to undermine confidence in the deliberate homicide conviction." Findings and Recommendations of the United States Magistrate Judge, Appendix E, p. 71a.

On appeal, the Ninth Circuit determined that "The state trial court's decision to amend Hagen's sentence under state law due to Hagen's trial

counsel's minor deficiencies is not inconsistent with its determination that Hagen did not suffer ineffective assistance of counsel for purposes of Strickland." Appendix A, p. 4a.

B. The Issue Presented to This Court.

The Montana post-conviction court's conclusions that counsel's performance was both deficient and prejudicial are unassailable in this proceeding. The question thus becomes: Where a post-conviction court determines both that trial counsel's performance was inadequate and that the petitioner is entitled to relief, is it reasonable to conclude that the prejudice went only to one of the counts and that the prejudice can be cured by running the sentences concurrently as opposed to consecutively?

28 U.S.C. § 2243 provides only the following guidance regarding the appropriate remedy in the case of a meritorious petition for a writ of habeas corpus: "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." Montana's statute regarding post-conviction relief § 46-21-201(6) MCA is similarly general: "If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and any supplementary orders as to reassignment, retrial, custody, bail or discharge that may be necessary and proper." Although not

mandating any particular form of relief, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.. 2d 674 (1984) and its progeny require that the remedy fit the error. See, United States v. Morrison, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed. 2d 564 (1981) (The remedy for a Sixth Amendment violation "should be tailored to the injury suffered and should not unnecessarily infringe on competing interests."); Kimmelman v. Morrison, 477 U.S. 365, 379, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) ("The Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel.")

An analysis of Montana's law of self-defense is in order regarding the issue of whether trial counsel's failures to investigate and prepare can be limited to only the aggravated assault charge. At the time of Hagen's trial it was clear that the appearance of danger, rather than the actuality of danger, controlled in applying the defense of justifiable use of force. State v. Daw, 43 P.2d 240, 242-43 (Mont. 1935). Even a mistaken belief that force was necessary could, nonetheless, result in the conclusion that a defendant's actions were reasonable. State v. Reiner, 587 P.2d 950, 956-57 (Mont. 1978).

Clearly then, Montana's law of self-defense did not require a showing, as seemingly has been required by the courts below, that Alice Goodrich actually was an aggressor or that she had a propensity for violence. What mattered were the

circumstances and Hagen's beliefs in light of those circumstances. Thus, a self-defense claim regarding the assault on Enger could apply equally to the deliberate homicide charge regarding Goodrich.[2] Whose testimony the jury believed – Hagen, Hagen and Gabby, or Enger and Cobeen – was critical. The determination of witness credibility could not be compartmentalized and deemed applicable to only one charge.

Significantly, the two shootings were never treated separately until the state post-conviction court, in an attempt to save the homicide conviction despite trial counsel's constitutionally deficient performance, fashioned the "remedy" of running the sentences concurrently. There was one event, one trial, and one jury deliberation. The evidence went to both charges. Trial counsel's failures went to the fact finding process – the guilt/innocence determination – and the fact finder in this case was a jury.

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[2] If the jury believed that Hagen thought he was being attacked by an unknown intruder, they could have acquitted, or at the very least, convicted him of mitigated deliberate homicide (that instruction was given) or negligent homicide (if the instruction had been requested). If, on the other hand, the jury believed that Hagen knew that he was fighting with Jim Enger they might have convicted him of both aggravated assault and deliberate homicide. Or, they might have split the decision as the courts have here. The point is that we don't know what they would have done in the absence of counsel's ineffectiveness.

The underlying rationale of the previous courts appears to be that, although there was a Sixth Amendment violation and Hagen was entitled to relief he was only entitled to partial relief because he had only suffered "some prejudice". However, the only logical remedy where ineffective assistance of counsel affects the guilt/innocence determination is a retrial, not an amended sentence. Where the charges are inextricably intertwined as they are here the trial of one count cannot be separated from the trial of the other.

Counsel has found no cases where a court has found both a Sixth Amendment violation and prejudice but has also found that the habeas petitioner is entitled to only partial relief. In this regard, the findings of the courts below appear to have resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings and that is contrary to, or involves an unreasonable application of, the relevant decisions of this Court. This case presents this Court with a unique opportunity to address the issue of the parameters of the relief that may be fashioned in the case of a Sixth Amendment violation.

CONCLUSION

For all of these reasons, a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 17th day of April, 2008.

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